Nos. 15276-77

In the United States Court of Appeals for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY, APPELLANTS

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR INTERSTATE COMMERCE COMMISSION, APPELLANT

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STATEMENT AS TO JURISDICTION

The appeal by the Interstate Commerce Commission filed August 18, 1956 (R. 41), is from the final judgment of the District Court for the Western District of Washington, Northern Division, entered June 19, 1956 (R. 37), setting aside an order (R. 388) of the Interstate Commerce Commission dismissing the complaints of appellees which sought awards of reparation from the intervening railroads. The District

Court did not write an opinion but filed its findings and conclusions (R. 28) which are not reported. The two reports of the Commission (R. 320 and 379), upon which its order is based are found at 277 I. C. C. 641 and 293 I. C. C. 510.

The jurisdiction of this court to review this judgment is conferred by 28 U. S. C. 225. See opinion of this court in *Interstate Commerce Commission, et al.* v. *Martin Brothers Box Company,* 219 F. 2d 811.

STATEMENT OF THE CASE

In the administrative proceeding,[1] appellees had sought reparation on carload shipments of ground peat which moved during a fifteen-month period beginning in January 1947 from points in British Columbia to points in the United States. Appellees also sought, for the future, lower rates on ground peat moving from points in British Columbia to points in northern California (R. 321–322).

The Commission originally granted the relief sought but by its order of June 21, 1954, reopened the proceedings for further consideration, and by report and order dated October 4, 1954, reversed its original action. The order of January 3, 1955, denied appellees' petition for reconsideration (R. 320, 377, 379 and 406).

The matter had its origin in a prior Commission proceeding, *Ex Parte No. 162, Increased Railway*

[1] Docket No. 29974, *Acme Peat Products, et al.* v. *Akron, C. & Y. R. Co.* Embraced in this docket was the companion case styled Docket No. 30260, *Alouette Peat Products* v. *The Atchison, Topeka and Santa Fe Ry. Co.*

Rates, Fares, and Charges, 1946, 266 I. C. C. 537, hereinafter referred to as the *General Increase* case. There the railroads were granted permission to make certain general increases effective January 1, 1947, in their basic freight rates in order to improve their unfavorable financial position. In making the increases effective, the carriers published one increase on peat rates when that commodity was listed in the tariffs under the fertilizer group and a higher increase where a separate commodity rate applied. The rates on peat from British Columbia were accorded the higher increase and resulted in the proceeding before the Commission which is here under review. A more detailed background of the case is shown in the first report, where the Commission stated (R. 323–325):

> The Commission set forth in general terms how the general increases authorized December 5, 1946, should be applied. In the appendix to the report, 266 I. C. C. at page 618, it stated:
>
> "Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, *In the Matter of Freight Commodity Statistics,* which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated

by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for submission."

In the case of rates on fertilizers n. o. s. [not otherwise specified] group 640, an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds or $1.20 per net ton, was authorized. Although peat, ground or unground, is included in the group of commodities listed under group 640, the carriers, in publishing increased rates as authorized, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where a separate commodity rate was published for peat, the full 20-percent increase, authorized on basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates, they were, on January 1, 1947, made subject to the full 20-percent increase. The rates sought are the basic rates in effect prior to January 1, 1947, increased in the manner that rates on fertilizers were increased.

The carriers gave the matter of increases further consideration on representations that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum of 6 cents. As a result thereof, defendants reduced the trans-

> continental rates on peat between and on December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents. However, prior to March 29, 1948, when defendants amended their master tariff [footnote omitted] to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the origins in British Columbia to points in northern California hereinbefore referred to, adding to the basic rates the full 20-percent increase, and withdrawing those rates from the application of the master tariff. Those are the only rates now in effect that are assailed by complainants.[2]

Hearing on the complaints filed with the Commission was held before an examiner of the Commission on November 10, 1948, at Seattle. Thereafter, following the filing of briefs, an examiners' proposed report was served. The examiners were of the view that appellees had failed to show that the assailed rates were unreasonable under Section 1 of the Interstate Commerce Act, or unduly prejudicial under Section 3, or inapplicable under Section 6. The examiners recommended that the complaints be dismissed (R. 309).

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[2] Appellees in Civil Action No. 3924 in the District Court in paragraph III of their complaint, stated that these rates to northern California points have now been reduced and that "no review is being sought in regard to or relief asked as to present rates charged by the railroads in this proceeding" (R. 51). The matter left for judicial review, then, was simply the Commission's refusal to award reparation. As such it was reviewable in a regularly constituted District Court of one judge. *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 443.

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Appellees filed their exceptions to the proposed report and the railroads filed their reply. Oral argument was then had before a division [3] of the Commission which thereafter issued its report and order under date of April 7, 1950 (R. 320). The division agreed with the examiners that appellees had not shown the assailed rates to be inapplicable under Section 6 of the Interstate Commerce Act or unduly prejudicial under Section 3. However, the division concluded that the Commission in the *General Increase* case, *supra,* had not intended that different increases should be applied to the same commodity and held the assailed rates to be unreasonable in violation of Section 1 (5) under an unprecedented theory of "unjust enrichment." Prior to this decision, the Commission had consistently held that in determining reasonableness under Section 1 the *total* rate or charge must be considered. The carriers had introduced evidence tending to show that the basic rates on peat were less than maximum reasonable rates and that as increased the total charge was still well within the zone of reasonableness. The division said that such evidence "misses the crux of the issue here presented" and concluded (R. 329–330):

> In the instant proceeding, the collection by defendants of charges which included increases in excess of those authorized by the Commis-

[3] The entire Commission consists of eleven members. It functions primarily through divisions consisting of three members each. Ordinarily a party dissatisfied with an order of a division may petition the entire Commission for reconsideration. 49 U. S. C. 17.

> sion clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted, * * *.

Thereafter, the railroads filed a petition for reconsideration by the entire Commission which was denied by order dated January 7, 1952. The parties then submitted their Rule 100[4] statement showing the amount due under the Commission's findings and under date of December 30, 1953, the Commission issued its order under 49 U. S. C. 16 (1) setting forth the amount due appellees which the carriers were directed to pay by February 19, 1954. Most, if not all, of the carriers elected not to pay the amounts found due and to await the shippers' court action based upon the Commission's order (49 U. S. C. 16 (2)).

Ordinarily the Commission's action of December 30, 1953, would have terminated the administrative proceeding. However, at about the same time the Commission, in another proceeding,[5] hereinafter referred to as the *Bolgiano* case, containing facts and arguments substantially similar to those here, had reversed its ruling based upon the newly devised "unjust enrichment" theory. That proceeding involved shipments of humus from Hyper-Humus, N. J., to points in several eastern states. The carriers here

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[4] This rule, together with all pertinent statutory provisions, is quoted in the Appendix to this brief.

[5] *F. W. Bolgiano & Co., Inc.* v. *Baltimore & O. R. Co.*, 291 I. C. C. 659.

involved then filed (March 8, 1954) their petition for leave to file a further petition for reconsideration on the strength of the Commission's action in the *Bolgiano* case. The petition was granted over appellees' objection and by order of June 21, 1954, the Commission reopened this proceeding for reconsideration.

Under date of October 4, 1954, the Commission issued its report and order on reconsideration. In that report the Commission reaffirmed its prior rulings that there was no showing on this record of violation of Sections 6 and 3 of the Act. Thus the Commission stated (R 381):

> As stated by the division in the prior report the complainant's contention that the assailed rates were not applicable has no merit, since a rate published in a tariff on file with this Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority.

And

> For the reasons stated in the prior report, there is no showing of undue prejudice.

However, on the issue of reasonableness under Section 1 the Commission reversed its prior ruling based upon the unprecedented "unjust enrichment" theory, examined the evidence concerning the reasonableness of the *total* charge involved and found that the evidence did not afford a sound basis for a finding of unreasonableness. The complaints were dismissed.

Appellees then filed a petition for reconsideration to which the railroads replied and that petition was de-

nied by order dated January 3, 1955. The court actions, one filed by Alouette Peat Products, Ltd., and the other by Acme Peat Products, Ltd., et al., followed. Since the two actions involved common questions of law and fact the court, by order and upon stipulation of counsel, consolidated them (R. 26).

Appellees alleged in their complaints (1) that the Commission had no authority to make its order of June 21, 1954, reopening the proceeding for further consideration, and (2) that the report and order of October 4, 1954, denying reparation and the order of January 3, 1955, denying reconsideration, were invalid.

Appellees filed a certified copy of the administrative record with the court, briefs were filed and the cause was argued before Honorable John C. Bowen, United States District Judge, at Seattle, Washington, on June 12, 1956. On June 19, 1956, the court entered its findings and conclusions as well as the final judgment setting aside the Commission's orders (R. 28–37).

The court held (1) that the Commission's order of June 21, 1954, reopening the proceeding for reconsideration amounted to a denial of due process to appellees, (2) that the assailed rates published and filed on less than 30 days' notice without express Commission approval were illegal and void, and (3) that those rates damaged appellees by causing a loss of market. The court remanded the matter to the Commission for the purpose of entering a reparation order.

QUESTIONS INVOLVED

The questions raised on appeal are these:

1. Did the Commission have authority to enter its order of June 21, 1954, thereby reopening the administrative proceeding for reconsideration? If so,
2. Are the assailed rates published in a tariff on file with the Interstate Commerce Commission null and void because they were published on short notice without specific Commission authority? If not,
3. Are the Commission's orders of October 4, 1954, and January 3, 1955, dismissing complaints seeking reparation based upon adequate findings which in turn are supported by substantial evidence in the record considered as a whole?

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding—

> That the increase in rates damaged the plaintiffs in this case by causing a loss of market. (Finding No. VII.)

In so holding, the Court exceeded its jurisdiction by substituting its judgment for that of the Commission on a question of fact.

2. The District Court erred in concluding—

> That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6-cent maximum permitted under Ex Parte 162. That the rates which were in effect im-

mediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission. (Conclusion of Law No. II.)

3. The District Court erred in concluding—

That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954. (Conclusion of Law No. IV.)

4. The District Court erred in concluding—

That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order

consistent with the findings of fact, conclusions of law and judgment herein entered. (Conclusion of Law No. V.)

5. The District Court erred in failing to sustain the Commission's orders which were based upon the conclusion that the complainants before it had failed to establish any violation of the Interstate Commerce Act for which they were entitled to reparation.

6. The District Court erred in entering judgment remanding the proceedings to the Commission for the purpose of entering a reparation order.

SUMMARY OF ARGUMENT

I

Under the Interstate Commerce Act, the Commission has continuing jurisdiction over its rate orders and may set aside an order granting reparation and reopen the proceeding for the purpose of correcting any error contained therein. The lower court's interpretation of the Commission's rule against successive petitions would deny this continuing jurisdiction contrary to the decision of the Supreme Court in *Baldwin* v. *Scott Milling Co.,* 307 U. S. 478.

The Commission's order of June 21, 1954, reopening the administrative proceeding for reconsideration was based upon a "change in circumstances" and, therefore, did not violate the Rule of Practice prohibiting successive petitions. The "change in circumstances" was the public announcement in another case of the abandonment of the novel "unjust enrichment"

theory first devised in the proceeding under review in this Court.

The rule against successive petitions is one of reason and the Commission's interpretation thereof should not be disturbed except upon the clearest showing of abuse of discretion.

II

In determining the applicability (legality) of a rate under Section 6 of the Interstate Commerce Act as distinguished from its reasonableness, etc. (lawfulness), equitable principles are not considered. Under that Act the initiation of rates is left with the carriers and a rate published in a tariff and not rejected or suspended but accepted for filing by the Commission becomes, upon the effective date shown therein, the *applicable* rate even though it violates some provision of the Interstate Commerce Act or some order of the Commission. This rule is of long standing and is in harmony with the purpose of the Act which is to have but one rate open to all alike and from which there can be no departure. Under the rule, a shipper may take the tariff at its face value and is not required to look beyond the tariff to determine whether it conforms to all provisions of the Act and to all pertinent orders of the Commission. If rates are to be declared illegal (inapplicable) because the tariff fails to provide thirty days' notice of their effective date and because they do not conform to outstanding orders of the Commission, shippers will be charged

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with knowledge which they do not, and frequently cannot, possess.

Even the Division which would have granted reparation to appellees did not propose to do so as an exception to this rule.

III

Section 9 of the Interstate Commerce Act allows a party complaining of a violation of the Act by a carrier to file a complaint with the Commission, or in some instances with the court, but he cannot pursue both remedies. Since appellees sought their relief from the Commission, it is important here that the court action be limited to a review of the Commission action, even on the question of applicability, and not become, in effect, a hearing *de novo*. Otherwise Section 9 is without a purpose.

The evidence reveals a rational basis for the Commission's conclusion that the charges paid by appellees were within the zone of reasonableness. In its original report in this case the Commission, contrary to its long-standing view, as well as to the ruling of the Supreme Court in *Great Northern Railway* v. *Sullivan,* 294 U. S. 458, undertook under the unprecedented "unjust enrichment" theory to find that a portion of the total charge was unjust, in violation of Section 1 (5). Upon further reflection, it withdrew from this position and proceeded to evaluate the total charge paid by appellees. It found that the total charge was not unreasonable.

The question of undue preference and prejudice under Section 3 (1) is one of fact for determination

by the administrative body and not by the court. The lower court violated that fundamental rule, as well as the purpose of Section 9 of the Act, by finding as a fact that the increases in rates damaged appellees by causing a loss of market.

The evidence of record failed to establish to the Commission's satisfaction any undue preference or prejudice, much less that damages were suffered by appellees. In fact the evidence indicates just the contrary. For example, the witness who testified in support of the Section 3 allegation admitted that his company in 1947—the year involved here—increased its production over 1946 by 50,000 bales and disposed of all but about 10,000 bales.

Even the Division of the Commission which originally voted to grant reparation to appellees was of the view, that this record would not support a finding of undue preference and prejudice.

ARGUMENT

I

The order of June 21, 1954, reopening the administrative proceeding for reconsideration was a valid exercise of power specifically granted to the Interstate Commerce Commission and did not violate its Rules of Practice

On December 30, 1953, the Commission issued what ordinarily would have been its final order in the administrative proceeding. The order set forth the amount of money damages to which the Commission had found appellees were due under its unprecedented unjust enrichment theory. The carriers were di-

rected by the order to pay the amounts specified therein by February 19, 1954.

However, in its report and order of February 11, 1954, in the *Bolgiano* case, 291 I. C. C. 659, the Commission on reconsideration of the "unjust enrichment" theory, which it had also applied in that case, reverted to its prior view that in considering the reasonableness of a rate under Section 1 (5) of the Act, the entire rate, that is, the total charge, must be considered. A petition for reconsideration of that order was denied by order dated June 7, 1954.

The carriers here involved, upon learning that the Commission had repudiated its novel theory of "unjust enrichment," immediately filed their petition dated March 2, 1954, for leave to file a petition for reconsideration of their case. This petition was specifically based upon "this change in circumstances" (R. 370). Appellees opposed the petition but the Commission, on June 21, after denying *Bolgiano's* petition for reconsideration on June 6, in the other case, granted the petition of the railroads for leave to file and allowed the filing of their petition for reconsideration.

The lower court held that the Commission's order of June 21, 1954, violated its own Rules of Practice, and thereby denied appellees due process (R. 35). In so ruling the court overlooked the specific provisions of the Interstate Commerce Act which give the Commission continuing jurisdiction over its reparation orders and misconstrued the Commission's rules of practice.

Section 16 (6) provides that the Commission may suspend or modify its orders upon such notice and in such manner as it shall deem proper, and Section 17 (6) provides, among other things, that after a decision of the Commission any party may at any time subject to such limitations as the Commission may establish, apply for reconsideration; that reconsideration may be granted if sufficient reason therefore be made to appear; and that such applications shall be governed by such general rules as the Commission may establish.

Under this statutory authority the Supreme Court has held that an order granting reparations may be reconsidered and reversed by the Commission years later, despite strong equitable considerations against reconsideration. *Baldwin* v. *Scott Milling Co.,* 307 U. S. 478. In that case the Commission had entered a reparation order which the carriers had complied with in 1929. Two years later, the Commission reopened the proceeding, and after further hearing entered its order dated July 3, 1933, reversing its earlier determination that reparations were due. The shipper refused to reimburse the carrier and was upheld in its position when the latter brought suit in the State court. However, the United States Supreme Court held that the carrier was entitled to recover even though the shipper had paid half of the amount received to an expert who represented it before the Interstate Commerce Commission. In its

discussion of the Commission's continuing jurisdiction over orders the Court stated (pp. 483–485):

> "But by § 16a, [footnote omitted] [now Sec. 17 (6)] the Commission was empowered to set aside its orders. That section was drafted by the Commission at the request of the Senate Committee on Interstate Commerce and was added by the Hepburn Act of 1906. It was 'a new section * * * which expressly authorized the commission to review and modify its own decisions.' [footnote omitted] It was expounded by the Commission as 'intended to give the commission a right to rehear a matter for the purpose of correcting any injustice in a previous order.' *Cattle Raisers' Assn.* v. *Missouri, K. & T. Ry. Co.,* 12 I. C. C. 1, 3. While careful to prevent applications for rehearing from being used to avoid or delay compliance with the commission's orders, it empowers the commission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. Respondent made its demand and collected the money subject to the authority of the commission to set aside the order which authorized payment of the same.
>
> "The clauses of § 16a that authorize the commission to consider facts arising after the former hearing and that make its decisions after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may

lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6 (7); see also § 10 (2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10 (3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. [Citing cases.] By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

"The retention by respondent of money collected under the findings and order that the Commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act."

The lower court's erroneous view of the meaning of the Commission's rule against successive petitions would deprive the Commission of this continuing jurisdiction over its orders. That rule provides:

"(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) [reconsideration] of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

The rule is obviously one of reason and whether or not a petition is based upon "substantially the

same grounds as a former petition" should be for the Commission to determine. The Commission's interpretation "of its rules or regulations is of controlling weight unless plainly erroneous or inconsistent." *Greene* v. *Dietz,* 143 F. Supp. 464, 470. On the closely related question of whether the Commission will entertain an original petition for reconsideration or rehearing, the courts have repeatedly held that question to be for the Commission and not for the courts, and that only the clearest showing of abuse of that discretion should sustain an exception to the rule. Thus in *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503 at 517, the Supreme Court stated:

> The rule that petitions for hearing before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other Federal agencies.

And at page 514 the Court stated:

> It has been almost a rule of necessity that rehearings were not matters of right but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order and not that of a reviewing body.

Also see *U. S.* v. *Pierce Auto Lines,* 327 U. S. 315 at 336.

Where the Commission is convinced that its action has been in error, simple justice and common sense require that it act to correct such error rather than wait for the courts to correct it. Thus in *Shein* v. *United States,* 102 F. Supp. 320, affirmed 343 U. S.

944, where the plaintiff argued that the Commission had erred in denying an application after first approving it, the Court said, p. 323:

> The very nature of our American practice has been that an aggrieved party may always have opportunity to say, "you made a mistake." If upon deeper research, fuller reflection and consideration the judicial or quasi-judicial body would see a mistake but persist in it, this would amount to mere obstinacy or stubborness and foster the highest form of injustice.
>
> This view was expressed by Chief Judge Parker of the Fourth Circuit in the matter of *Beard-Laney, Inc.* v. *United States,* D. C., 83 F. Supp. 27, at page 33 where he said: "The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed."

In the present case, the carrier's petition of March 2, 1954, was based upon "this change in circum-

stances"—the Commission's ruling in the *Bolgiano* case. The "change in circumstances" was adequate reason for granting the petition.

II

A rate published in a tariff and accepted for filing by the Interstate Commerce Commission is the legal (applicable) rate even though it violates some provision of the Interstate Commerce Act or some order issued by the Commission

Under the Interstate Commerce Act, the right to initiate rates is left with the carrier. Under that Act, the carrier publishes the tariff and submits it to the Commission for filing (Sec. 6 (1)). The Commission may reject (Sec. 6 (6) and (9)) the new tariff if the tariff fails to give lawful notice of its effective date (30 days, which the Commission may waive) (Sec. 6 (3)), or the Commission may suspend the new tariff either upon complaint or upon its own motion for a maximum period of seven months, and enter into an investigation of the lawfulness of the rates contained therein (Sec. 15 (7)). If the Commission files the tariff and does not reject or suspend, the rates contained therein become the *legal* rates which the carrier must charge and the shipper must pay, notwithstanding the possibility that the rates may violate some other provision of the Act, such as being unreasonable under Section 1, or discriminatory under Section 3. Equitable considerations (lawfulness of the rate) are left for consideration under those other sections of the Act. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197.

The above-described method of making rates effective has its weakness in situations where the carriers

desire to change a large group of rates as, for example, in the *General Increase* cases. If the tariffs containing such broad changes were submitted to the Commission for filing, they would in all probability be suspended, thereby bringing on hearings which would undoubtedly result in modification of the proposals of the carriers, with resulting expense and confusion in withdrawing the original tariffs and making the necessary changes.

By reason of this situation, the custom has grown up of entertaining petitions of the carriers which indicate in a general way the increases they propose to make. The Commission, usually after formal hearings, issues its report indicating what action, if any, the carriers may reasonably take to obtain more revenue. In such a proceeding, the Commission does not determine the lawfulness of a particular rate, nor does it prescribe any particular rate. The purpose of such a proceeding is to ascertain in advance of the filing of the tariffs just what increases, if any, the Commission will allow to become effective without suspension. *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487.

In Ex Parte No. 162, the *General Increase* case, *supra,* 266 I. C. C. 537, the basic administrative proceeding involved in this appeal, the Commission determined what increases it would allow to become effective on six days' notice without suspension. The general increase was to be 20 percent, with certain exceptions. Thus, on fertilizer the increase was to be 20 percent, subject to a maximum of six cents per

hundred pounds, or $1.20 per ton. In some instances the rates on peat are published under the fertilizer group and in others as specific commodity rates.[6] In publishing the increases the carriers showed a maximum of six cents per hundred pounds, or $1.20 per ton, on peat when that commodity was listed under the fertilizer group, but showed the full 20 percent increase when that commodity was not listed under the fertilizer grouping. The Commission accepted and filed the new tariffs. Since the Commission did not reject or suspend any part of these new tariffs, the rates contained therein became the *legal* rates, binding alike on carrier and shipper even though, as the Commission states, it had not intended

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[6] The distinction between class and commodity rates is explained in *New York* v. *United States*, 331 U. S. 284, 290, footnotes 2 and 3, as follows:

"2. The *class rates* are in the form of a schedule which shows the price per 100 pounds for moving first-class freight every possible distance it may be moved. The cost of shipment for a given commodity is determined by ascertaining its classification rating, the first-class rate per 100 pounds for the haul involved, and the percentage of the first-class rate to which the classification rating in question is subject. See 262 I. C. C., pp. 515–519.

"3. There are three other kinds of rates:

"*Exception* rates are rates resulting from the transfer of a commodity out of its regularly assigned class in the classification and into another class.

"*Commodity* rates are special rates established for particular commodities. For purposes of these rates a commodity is not given a classification rating; the result is that the commodity rates have no fixed percentage relationships to first-class rates.

"*Column* rates are fixed as definite percentages of first-class rates but like commodity rates they apply only to particular commodities and are assigned no regular class."

See 262 I. C. C., p. 562.

for the railroads to publish the full 20 percent increase on peat (R. 326–327).

The rule that a rate published in a tariff and accepted for filing by the Commission is the *legal* rate even though it violates some provision of the Interstate Commerce Act, or some order of the Commission, is of long standing and is based upon sound reasons. Since the creation of the Interstate Commerce Commission, simplicity, clarity, and certainty in both tariff publication and tariff interpretation have been among the prized objectives that Congress, the courts, and the Commission itself have striven to achieve.

Section 6 (7) of the Act provides that carriers shall collect the rates "which are specified in the tariff filed and in effect at the time." Pursuant to that language, and in the interest of certainty and clarity in tariff interpretation questions, the Commission has held that there can be no departure from the published tariff in determining questions of applicability under section 6. These decisions have been squarely in line with the statement by the Supreme Court in *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94, at page 98, that: "It was the purpose of the act to have but one rate, open to all alike and from which there could be no departure."

It frequently happens that shippers make commitments or contracts for the delivery of commercial goods based upon reduced freight rates voluntarily published by the carrier without the prior approval of the Commission. If rates contained in tariffs pub-

lished and filed with the Commission are illegal or void because they fail to provide proper notice, or because they do not conform to an order of the Commission, then the shipper can no longer rely upon the rate *specified in the tariff;* he must look beyond the tariff to determine the applicability or legality of his rate. In this connection, it should be emphasized that if a reduced rate on past shipments is found void or inapplicable for any reason, the duty rests upon the carriers to collect, by court action if necessary, the higher pre-existing applicable rate. As to past shipments, the shipper generally would have no recourse because rates voluntarily reduced by the carriers usually are below maximum reasonable rates within the meaning of Section 1 of the Act.

Tariff irregularities frequently are discovered after considerable tonnage has moved under rates contained in tariffs that have been received for filing with the Commission. These irregularities range from failure to comply with Commission orders and tariff publishing rules to the failure to conform to the requirements of lawfulness within the meaning of Sections 1, and 3 as well as other sections of the Act dealing with rates. Throughout the life of the Act, one of the basic principles that has been applied by the courts and this Commission is that the shipper, as well as the carrier, is charged with full knowledge of the legal or applicable rate within the meaning of Section 6. *Louis. & Nash. R. R. Co.* v. *Maxwell,* 237 U. S. 94, 97.

If rates are to be declared illegal or inapplicable because the tariff fails to provide proper notice, or

because they do not conform to outstanding orders of the Commission, then the shipper would be charged with knowledge which he does not, and frequently could not, possess. This is true, first, because the average shipper does not have reports and orders of the Commission from which he could determine whether a particular rate conformed to the requirements of an order dealing with given rate adjustments, assuming that he was qualified to interpret the order; second, the question of whether a particular tariff is published on statutory notice or any shorter notice that might be authorized by the Commission depends entirely upon when the tariff was received and filed by the Commission. The shipper of course has no way of knowing when a given tariff was received by the Commission for filing. And, third, the average shipper has no knowledge of the terms of short notice authority authorized by the Commission in particular situations.

Even the division which attempted to give the appellees some relief did not propose to do so as an exception to this rule. Thus, with regard to appellees' contention that the rates assailed were not applicable, it stated (R. 326):

> Complainant's contention that the rates assailed were not applicable has no merit Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender. [Citing case.] In *Kansas City Fuel Oil Co.* v. *Atchison, T. & S. F. Ry. Co.*, 210 I. C. C. 134, Division 3 said,

> at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Another Commission case practically on all fours with the present one is *Greene Cananea Copper Co.* v. *C., R. I. & P. Ry. Co.*, 88 I. C. C. 225 (1924), where the Commission held that a rate published on less than 30 days' notice without prior approval was nonetheless the *applicable* rate. There the Commission in a "revenue" proceeding had authorized the carriers to make certain percentage increases effective on five days' notice, but did not include increases on certain types of shipments to Mexico. The new tariffs published on five days' notice also contained increases on those types of shipments. The Commission stated:

> Complainant's case rests solely on the question *whether the rates* named in supplement No. 4 to Agent Countiss' I. C. C. No. 1077, issued August 18, 1920, to become effective August 26, 1920, *were lawfully established.* By this supplement defendants provided for an increase of 33⅓ percent in the rates named in No. 1077, applicable, among others, from points in the United States to Cananea, Mexico, which action purported to be in accordance with the special permission granted by us in *Increased Rates,* 1920, 58 I. C. C. 220. *No such authority was granted.* Therefore, in making the increases in question effective upon less than statutory notice, defendants failed to observe the provisions of section 6 of the interstate commerce act, *but as we accepted supplement No. 4 for filing,*

> the rates named therein became the only lawful rates which could have been applied on the traffic in question.[7] [Emphasis supplied.]

The United States Supreme Court has followed the same rule. *Davis* v. *Portland Seed Co.,* 264 U. S. 403 (1923), involved actions brought by shippers to recover alleged overcharges demanded by the carriers in violation of Section 4 of the Interstate Commerce Act. That section, speaking generally, prohibits without prior Commission approval, a greater charge for transportation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. In one case, cited by the Court as typical, the facts showed that the carrier had published and filed without prior Commission approval rates on alfalfa seed which were lower from Pecos, Texas, to Walla Walla, Washington, than from the intermediate point of Roswell, New Mexico. The shipper at Roswell claimed that the lower rate from Pecos became the maximum that could be charged from Roswell under Section 4. In ruling against the shippers' contention the Court stated at page 415:

> Relying on *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, the Interstate

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[7] Other Commission cases in point are *Bacon Bros.* v. *Alabama G. S. R. Co.*, 263 I. C. C. 587, 590 (1945); *Chase & Co., Inc.*, v. *Atlantic C. L. R. Co.*, 220 I. C. C. 398, 400 (1937); *Dewey Portland Cement Co.* v. *Atchison T. & S. F. Ry. Co.*, 185 I. C. C. 233 (1932); *Ralston Purina Co.* v. *Atlanta B. & C. R. Co.*, 174 I. C. C. 722 (1931); *Concrete Engineering Co.* v. *Baltimore & O. R. Co.*, 160 I. C. C. 675 (1930); *Southern Trans. Co.* v. *Norfolk & W. Ry. Co.*, 147 I. C. C. 29, 36 (1928); *Brown & Sons Lbr. Co.* v. *Louisville & N. R. Co.*, 37 I. C. C. 507 (1915).

> Commerce Commission has definitely rejected respondents' theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, § 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. * * *

And at page 425:

> The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; § 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in *United States* v. *Louisville & Nashville R. R. Co., supra;* but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

Also in that decision, at page 424, the Court refers to the Commission's view that a schedule (tariff) containing a plain clerical error must be observed, and that any higher charge collected may be recovered by the shipper.[8]

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[8] In his text, Freight Rate Application (1948) Glenn L. Shinn states (p. 42):

"An error in tariff publication affords no legal ground for a departure from the applicable tariff provisions. For instance, in a case where due to an error in the publication of the tariff the figures 7 and 1 were transposed with the result that a rate of

In the only case[9] upon which appellees have relied in support of their position, the Supreme Court of Minnesota did not refer to the above-cited view of the Commission, and in reaching its conclusion misread the above-quoted language in the *Davis* case.

There the railroad had made an error in the publication of a rate in one of its tariffs. One of the rates shown therein was stated in writing as twelve and one-half cents, and in figures as 16½ cents. The carrier sought and was granted permission to correct the tariff on short notice—the Commission's order containing the statement that the carrier's application was denied "insofar as it requests further relief." In making the correction on short notice another error was made. A rate formerly shown as 17.5 cents appeared in the reissued tariff as 1_.5 cents. Several carloads of grain moved during the period the 1_.5-cent rate was shown in the tariff, the railroad collected charges based upon that rate, and later

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17.5 cents was published instead of the intended rate of 71.5 cents, the Commission found that the erroneously published rate of 17.5 cents was available as an intermediate factor in determining the applicable through rate; and concerning defendants' contention that complainant's claim was inequitable, the Commission said that the determination of any applicable rate is not affected by the equities of the complaint. [Citing *Stein Co.* v. *Gulf, C. & S. F. Ry. Co.*, 153 I. C. C. 185.] This rule, it should be explained, is uniformly applied irrespective of whether the resulting rate violates provisions of the Act or outstanding orders of the Commission. This is in accord with the statement by the Supreme Court that the statute requires rigid observance of the tariff without regard to the inherent lawfulness of the rate specified. [Citing *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 425.]"

[9] *Illinois Cent. R. Co.* v. *Van Dusen, Harrington Co.*, 212 N. W., 940 (1927).

sued the shipper for the balance claimed due under the 17.5-cent rate. The State Court allowed the railroad to recover on the theory that the 1.5-cent rate never became effective because published in violation of the Commission's order, and on less than 30 days' notice in violation of Section 6. In its opinion the Court relied upon the *Davis* case, *supra,* among others, and on a later Commission order which indicated that the applicable rate was not the 1.5-cent rate but rather a class rate which was even higher than 17.5 cents.[10]

In relying upon the *Davis* case the Minnesota Court quoted a statement out of context, and misread the holding. As shown above, the Supreme Court in the *Davis* case followed the Commission's interpretation of the statute, and held that the publication of the lower rate for the longer haul, in violation of Section 4, did not affect the *applicability* of the higher rate published and filed for application at the intermediate point. The shipper was arguing that the lower rate published for appliaction at the further point (Pecos) became the maximum which the carrier could charge from the intermediate point (Roswell) notwithstanding the higher published rate therefrom, and that the sum charged the shipper at the inter-

[10] The order made "at the instance of the carriers" was merely a permissive order issued to allow the carriers to adjust their charges without the filing of special docket applications. It was not the result of any formal docket in which an issue was joined concerning the applicability of a rate on the shipments concerned. Moreover, the rate involved there was clearly ambiguous on its face.

mediate point was an illegal exaction to the extent it exceeded the lower rate, recoverable without proof of damage and without regard to the intrinsic reasonableness of either rate. (264 U. S. at 415.) The language quoted by the State Court that it "would be going too far to hold * * * that the unauthorized publication established the lower rate as the maximum permissible charge" has reference to the attempted application of the lower rate at the intermediate point of Roswell for which a higher rate was published. The lower rate was the *applicable* rate from the farther point of Pecos, and the higher rate was the *applicable* rate from the intermediate point of Roswell, although published in violation of Section 4.

III

Under the established rules for judicial review of Commission orders the district court erred in failing to find that the Commission's orders of October 4, 1954, and January 3, 1955, dismissing the complaints were based upon adequate findings which in turn were supported by substantial evidence on the record considered as a whole

While the Commission proceeding dealt with the question of rates for the future as well as reparation on past shipments, the Court action as heretofore pointed out (p. 5) is concerned only with the reparation question.

Under Section 9 of the Interstate Commerce Act, a person complaining of a violation of the Act by a common carrier, may either file a complaint with the Commission or, in certain cases, go into court in the first instance, but can not pursue both remedies. Having in this case sought relief from the Commis-

sion it seems clear that prior to *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, appellant could not have maintained this court action. But in that case the Supreme Court held that Section 9's prohibition extended only to the *initiation* of an action for damages in court after resort to the Commission had been in vain, 337 U. S., at 432–440.

The Supreme Court did not state what the scope of review should be (see the dissenting opinion at pages 457–458), but later when the order involved in that case was before the Court of Appeals for the District of Columbia circuit for review, that Court stated that it would apply the standards of review generally applicable to administrative action. *United States* v. *Interstate Commerce Commission,* 198 F. 2d 958, at 963–64, cert. denied, 344 U. S. 893. The same rule has been followed in this circuit. *Interstate Commerce Commission* v. *Martin Brothers Box Co.,* 219 F. 2d 811, cert. den. 350 U. S. 823.

It is well settled that an order of the Commission is subject only to limited review in the courts and that the proceeding upon which the order is based is not to be heard and decided *de novo.* Thus the court does not hear new evidence not presented to the Commission, *Sakis* v. *United States,* 103 F. Supp. 292, 313, or decide such factual questions as to whether the assailed rates were unreasonable or prejudicial, *Interstate Commerce Commission* v. *Martin Brothers Box Co., supra.* If the court determines that the Commission made findings sufficient to indicate the basis for its conclusions, that such findings have sub-

stantial support in the record and that the Commission has not misapplied the law, the power of review is exhausted.

> * * * Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. * * *
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> * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. * * *
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> [*Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 139–140, and 146.]
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> So long as there is warrant in the record for the judgment of the expert body it must stand. * * * "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" * * *
>
> [*Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 513.]

The findings necessary in a Commission report of the type hereunder review need not be set out with formality nor expressed in terms which courts generally employ. The law is satisfied if "the report, read as a whole, sufficiently expresses the conclusion of the Commission based upon supporting data." *Alabama*

Great Southern R. Co. v. *United States,* 340 U. S. 216, 227–228.

Ordinarily, the Commission's conclusions of law, such as the determination of tariff applicability under Section 6 (discussed in the preceding chapter of this brief), do not have the same claim to finality as do findings of fact. However, the courts do and should give great weight to such conclusions. *Levinson* v. *Spector Motor Company,* 330 U. S. 649, 672, *Medo Corp.* v. *Labor Board,* 321 U. S. 678, 681, and footnote thereon and *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 549. Those interpretations should be upheld unless they are clearly wrong. In other words, the question for the Court should be whether there is room on the record for the Commission's determination or, stated otherwise, whether there is a rational basis for the Commission's conclusion. Compare *Gray* v. *Powell,* 314 U. S. 402, 411–414, *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 136, 139, 146, and *Shields* v. *Utah-Idaho R. Co.,* 305 U. S. 177, 181, and 184. To ignore the Commission's conclusion in a reparation case such as this and to reach a contrary conclusion upon an independent examination of the tariffs and statutes involved would, in effect, be granting a remedy which Section 9 of the Interstate Commerce Act prohibits. To prevent appellees from getting "two bites at the cherry" in violation of Section 9, it is essential that the Court proceeding be limited strictly to a review of the Commission's action and not become in effect a new trial.

With these rules in mind we turn to an examination of the Commission's report and order of October 4, 1954, and its order of January 5, 1955, denying reparation. The report is a part of the order. *Georgia Commission* v. *United States,* 283 U. S. 765, 771. In the report the Commission concluded that the assailed rates were applicable and had not been shown to be unjust, unreasonable, or otherwise unlawful (R. 386–387). In the preceding chapter of this brief we have discussed the question of *applicability* and will therefore limit our discussion here to the questions of *reasonableness* under Section 1 (5) and of *undue preference and prejudice* under section 3 (1).

A. The assailed rates were not shown to be unreasonable.

The evidence concerning the reasonableness of the rates as increased upon appellees' shipments is summarized in the Report of the Commission on Reconsideration and will not be repeated in detail here (R. 380–386). Briefly the Commission considered the origin, nature and purpose of the product, its transportation characteristics, its value, the volume of traffic involved, where it moved, the history of the rates thereon to western points in the United States, including the different rates to points in California, and the car-mile revenue yields of those rates to various points.

The Commission concluded that this evidence was not sufficient to show that the rates as increased (the total charge) were unreasonably high. Indeed, the evidence indicates that the assailed rates were well within the zone of reasonableness. For example, the

Commission compared the rates as increased to San Francisco and Los Angeles of 70 cents and 86 cents with rates of 88 cents and $1.10 to the same points which became effective in March 1938, pursuant to another *General Increase* case. A railroad witness also developed the fact that the basic rates had been voluntarily established originally on an extremely low level to permit these appellees to reach midwestern and eastern markets (R. 256–258).

We do not understand appellees to seriously urge that the total rate was too high. Their contention was that the *increase* was beyond what the Commission had found to be reasonable and, therefore, they were entitled to reparation. Furthermore, it is interesting to note that the report of the Division favorable to appellees did not find the *rates* as increased to be unreasonable. Thus in answer to the carriers' effort to establish that the whole rate (the basic rate plus the increase of 20 percent) was reasonable, the Division stated that such evidence "misses the crux of the issue here presented" (R. 328) that the reasonableness of the *increase* had been determined in the *General Increase* case, that the carriers had no right to publish any greater increase without further proceedings before the Commission and that to allow the carriers to retain the amount of increase above what had been authorized would result in their "unjust enrichment." While the reasonableness of the *increase* was determined in the *General Increase* case,

the reasonableness of the rate as increased (the total charge) was not determined.[11]

In determining the lawfulness of a rate under Section 1 of the Act, the Commission has long held that the total charge and not just some component of the rate must be considered. An excellent discussion of this subject is contained in the dissenting opinion of Commissioner Elliott (later followed by the entire Commission in this case) in the first *Bolgiano* case, 289 I. C. C. 169. That case involved the same rate adjustment and the same legal principle as is involved in this case. That case followed this one in point of time and the Division by a majority vote agreed that the shipper was entitled to reparation under the "unjust enrichment" theory originally propounded in the case now before this Court.

There Commissioner Elliott shows that the Commission had ruled that the total through charges from origin to destination must be considered when a complainant is claiming damage by reason of the exac-

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[11] In a *General Increase* case, the Commission does not, indeed as a practical matter it cannot, determine the reasonableness of any particular rate under Section 1. In fact it specifically disclaims any intention of so determining. Thus, in Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946*, in finding No. 15, the Commission stated, 266 I. C. C. at 617:

"15. Rates and charges increased as herein permitted are not considered as prescribed rates within the meaning of *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370."

That finding leaves the question of lawfulness of the individual rates and any question of reparation open for determination in an appropriate proceeding. See *Algoma Coal & Coke* v. *United States*, 11 F. Supp. 487, 493.

tion of unlawful components of through rates; that the Supreme Court has stated that the shipper's only interest is that the charge shall be reasonable as a whole;[12] that the Commission had ruled that in determining whether reparation was due consideration must be given to the total charge resulting from the basic rate plus the increase. The Commissioner then summarizes the holdings of the many cases he cites as follows (p. 173):

> Whatever else may have been decided in all of the foregoing cases, I think it must be admitted that where there is an issue as to reparation on past shipments the Commission has repeatedly and consistently held that in the determination of the reasonableness of rates which are composed of more than one element the *total charges,* whether they be combination rates or a basic rate plus some part of a general increase, must be considered.

Since in our case the shippers have not shown that they have paid an unreasonably high *total charge,* they cannot recover reparation. And the law does not permit the Commission to assess a penalty against the carriers for violation of the Act or of some Commission order. Only the courts may do that in an appropriate proceeding. As the Supreme Court stated in *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, at 199–200:

> There were many provisions in the statute for imprisonment and fines. On the civil side

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[12] "The shipper's only interest is that the charge shall be reasonable as a whole." *Great Northern Ry. Co.* v. *Sullivan,* 294 U. S. 458, 463.

the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons* v. *Chicago & N. W. Railway,* 167 U. S. 447, 460, construing this section (8) "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the act of June 18, 1910 (36 Stat. 539 c. 309), provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910) 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82.

And so in this case appellees seek to "recover what though called damages would really be a penalty."

B. The assailed rates were not shown to be unduly prejudicial to appellees

Section 3 (1) provides in part:

It shall be unlawful for any common carrier subject to the provisions of this part to make,

> give or cause any undue or unreasonable preference or advantage to any particular * * * corporation * * * locality * * * in any respect whatsoever; or to subject any particular * * * corporation * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

To prevail under this section, a complainant must show (1) that there is preference of one shipper or locality and prejudice against another, (2) that the prejudice is undue, (3) that a carrier or group of carriers effectively participates in the rates over both routes, and (4) if reparation is sought, that the undue prejudice has caused actual damage to complainant. *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, and *T. & P. Ry. Co.* v. *United States,* 289 U. S. 627, 648–650. Findings under this section are factual and if supported by substantial evidence are conclusive. *Virginian Ry.* v. *United States,* 272 U. S. 658, 663, and *United States* v. *Trucking Co.,* 310 U. S. 344, 352. As the Supreme Court stated in *Penna. R. R. Co.* v. *International Coal Co., supra,* at p. 196:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the

> administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in condition are not matters of law. *So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.* That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals. [Emphasis supplied.]

In the present case, the court below violated that fundamental and well understood rule by substituting its judgment for that of the Commission on the factual question of whether appellees had been damaged by paying the higher rates. Thus the court ruled (R. 33; Finding No. VII):

> That the increase in rates damaged the plaintiffs in this case by causing a loss of market.

That finding also is contrary to the stated purpose of Section 9 of the Interstate Commerce Act, as previously pointed out at page 36 of this brief as it allows the shipper to contest the same question of fact before the Commission and before the court.

Let us examine the evidence now to determine whether there is rational basis for the Commission's conclusion that the record fails to show undue prejudice to appellees. Eleven percent of the shipments involved here moved to points east of Chicago (R. 196). Those appellees who shipped into this area claimed that the rate structure as changed unduly

preferred shippers in eastern Canada and Maine and unduly prejudiced appellees. They assumed, without attempting to show, that the rates were properly related prior to the *general increase* (R. 235) and argued from that premise that the rates as increased became improperly related. For example, the basic rate to Philadelphia was 90 cents from British Columbia and 36 cents from Maine. The 90-cent rate was increased by 20 percent to $1.08, while the 36-cent rate was increased by only 6 cents to 42 cents (R. 185).

At about the same time of the *General Increase,* at least one of the appellees (R. 163–192) increased its price on peat by 10 cents per bale to $1.85 (R. 167, 174, 178, 183). However, after the increase became effective it found that its price in the eastern market was about 20 percent higher than its competition and so reduced its price back to $1.75 per bale (R. 175, 182, 191). Appellees could offer no specific evidence of the competition (R. 177, 233), but did know that they were competing in the eastern market not only with eastern peat, but also with such substitutes as "ground corncobs, sugarcane husks, sugarcane refuse, and various other competing products" (R. 173). The witness who testified in support of the alleged Section 3 violation also stated that his company increased its production by 50,000 bales in 1947 over 1946 and disposed of all but about 10,000 bales of this increase (R. 179). This testimony certainly doesn't indicate that the shipper was damaged!

The Commission found that appellees had failed to make a showing of undue prejudice (R. 381). Even

the Division which originally issued the report favorable to appellees agreed that appellees had not shown a violation of Section 3, much less that they had suffered damage. There the Division in summarizing the evidence stated (R. 330):

> In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States; that during most of the year 1947 the full 20-percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of 6 cents; and that their prices could not be correspondingly increased. To those consuming points, the distances from the origins herein average about 3,500 miles, as compared with an average of only 1,000 miles from the alleged preferred points. Complainants encounter competition also with peat substitutes, such as sugarcane products, straw, corncobs and ground bark. The differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants having effective control of the rates subjected or subject complainants to undue prejudice.

As previously noted, appellees' contention is that the unequal increases on peat in and of themselves constitute a violation of some provision of the Interstate Commerce Act. It is not surprising then that their evidence would be of a general nature and not

specific enough to show violation of Section 3. They *assumed* that the basic rates were properly related and did not undertake to show otherwise. A mere showing of a difference in rates does not prove undue prejudice. As the Commission stated in *R. C. Williams and Co.* v. *New York Central R. Co.*, 269 I. C. C. 297, 301:

> * * * It is well settled that a mere difference in rates is not sufficient to constitute undue prejudice. There is no showing of specific shipments to the alleged preferred points. Undue prejudice and preference must be established by a preponderance of evidence which must make it reasonably clear that the prejudice and preference complained of result from the rate adjustment of which complaint is made. Undue prejudice and preference may not be assumed or left to inference. Moreover, general declarations as to competition or injury unsupported by evidentiary facts, do not warrant a finding of undue prejudice. [Citing case.]

Furthermore on the question of damage, appellees' showing was concerned only with the difference in the increases. They claimed to be damaged in that amount.[13] However, such a general showing is not sufficient proof of damages to award reparations under Section 3. In *Sand, Gravel, and Crushed Stone*, 181 I. C. C. 373, 393, the Commission stated:

> * * * We have repeatedly held that undue prejudice within the meaning of the act or-

[13] The lower court would find them damaged in a greater amount.

dinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relationship exists between the parties concerned. In the *Woodsum* case, cited by the court, we specifically found, on evidence disclosing the rate disparity, the relative transportation conditions, and the competitive situation, that the rate there assailed was and for the future would be unduly prejudicial to the extent there indicated and required the undue prejudice to be removed. In the same case in discussing the question of reparation, we said at page 246:

> "However, there is nothing of record to indicate that the price which complainants receive for their coal is fixed by their competitors or that the alleged loss of profits is the direct result of the undue prejudice hereinafter found to exist. Nor is complainants' evidence with respect to loss of business sufficiently definite to enable us to determine whether such loss was the result of the undue prejudice. * * * For the reasons set forth above, reparation is denied."

Neither this commission nor the Supreme Court has ever held that the evidence to establish the fact of undue prejudice and preference must be the same as is necessary to warrant an award of reparation on account of undue prejudice and preference.

Compare *Penna R. R. Co.* v. *International Coal Co., supra* at 198, and *Interstate Commerce Commission* v. *United States, supra,* at 392–393.

It is quite evident from the above discussion that the Commission was warranted in finding upon the facts of this case that appellees had failed to make a showing of undue prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed, and the case remanded with instructions that the Court enter a judgment sustaining the Commission's report and order, and that the cause be dismissed.

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APPENDIX

Applicable Statutory Provisions and Commission Rules of Practice

INTERSTATE COMMERCE COMMISSION'S GENERAL RULES OF PRACTICE (49 CFR 1.1 ET SEQ.)

Rule 100. *Statements of claimed damages based on Commission findings.* When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with the form No. 5. (See appendix.) The statement should not include any shipment not covered by the Commission's findings, or any shipment on which complaint was not filed with the Commission within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shipments moved over more than one route, a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges for verification and certification as to its accuracy. If the statement is not forwarded immediately to the collecting carrier for certification, a letter request from defendants that forwarding

be expedited will be considered to the end that steps be taken to have the statement forwarded immediately. All discrepancies, dupplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the Commission. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case, its certificate must be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the Commission, whereupon it will consider entry of an order awarding damages.

Rule 101. *Petitions for rehearing, reargument, or reconsideration.*—(a) *In general.*—A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

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(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirements desired by petitioner.

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(f) *Successive petitions on same grounds, not entertained.*—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.

INTERSTATE COMMERCE ACT (24 STAT. 379) AS AMENDED, (49 U. S. C. 1 ET SEQ.)

Sec. 1. (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep

open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Sec. 6. (3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its

discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

Sec. 6. (6) The schedules required by this section to be filed shall be published, filed and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any

portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 6. (9) The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be

pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 15. (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If

the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 16. (1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sec. 16. (2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or

any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

SEC. 16. (6) The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Sec. 17. (6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall

be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

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